

No. 05-956

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**In the Supreme Court of the United States**

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DONNA M. CAWLEY, ADMINISTRATRIX OF THE ESTATE  
OF IDA ABRAHAM, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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### QUESTION PRESENTED

Whether the court of appeals correctly upheld the Tax Court's factual findings that decedent retained the possession or enjoyment of property she transferred to three family limited partnerships, and that the transfers were not bona fide sales for adequate and full consideration, such that the full value of the assets transferred was included in the decedent's gross estate under 26 U.S.C. 2036(a).

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 408 F.3d 26. The decision of the Tax Court (Pet. App. 30a-57a) is reported at 87 T.C.M. (CCH) 975.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. 29a) was entered on May 25, 2005. A petition for rehearing was denied August 29, 2005. On November 21, 2005, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 26, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Decedent, Ida Abraham, transferred the vast majority of her property to three family limited partnerships before her death, receiving limited partnership interests in return. Substantial portions of her interests in the limited partnerships were subsequently transferred to three of her children. The Tax Court and the court of appeals held that the full value of the transferred property, not merely the value of decedent's proportionate partnership interests, must be included in decedent's gross estate under 26 U.S.C. 2036(a)(1), because there was an agreement that decedent would retain the right to the income from the property.

1. Decedent developed Alzheimer's disease, and the Massachusetts Probate and Family Court placed her under a guardianship on March 10, 1993, when she was 76 years old. Pet. App. 32a. Decedent had four children: Nicholas A. Abraham, Richard Abraham, Donna Cawley and Diana Slater. *Id.* at 31a. (The oldest child, Nicholas Abraham, did not participate in the estate plan that was developed.) Among decedent's substantial assets were three pieces of commercial real estate worth several million dollars. Decedent's guardians petitioned the probate court for permission to make gifts of decedent's property not needed for her support. *Id.* at 32a & n.5. After extensive mediation by the probate court judge, family members agreed on an estate plan, which the probate court adopted in a stipulated decree in August 1995. *Ibid.* The estate plan called for the formation of three family limited partnerships (FLPs), one for each of the three children who were parties to the plan, and for decedent to transfer the three large real estate holdings to those partnerships. *Id.* at 33a.

Decedent was to be both a general and limited partner in each FLP, and the children were to be limited partners in their respective FLPs. Pet. App. 33a. The estate plan appointed David Goldman as “a limited guardian ad litem” for the benefit of decedent with regard to her general and limited partnership interests in each of the three partnerships. *Id.* at 34a.

Each FLP had a management company as its corporate general partner, and each of those companies, in turn, was owned by a trust. Pet. App. 37a. David Goldman, who was decedent’s guardian ad litem, was the sole corporate officer of two of the management companies, and was trustee of the corresponding trusts. *Ibid.* Similarly, Harold Rubin, who was appointed a limited guardian ad litem for decedent with respect to the interests of Richard Abraham, was president of the third management company, and initially was the sole trustee of the corresponding trust. *Id.* at 37a & n.11. As president of the respective management companies, Messrs. Goldman and Rubin had management responsibilities over their respective partnerships, and the right to determine how the partnerships’ income would be distributed. *Id.* at 37a.

Upon formation of their FLP, Donna Cawley and Diana Slater each received a 1% limited partnership interest, each corporate general partner received a 1% general partnership interest, and decedent received the remaining 98% limited partnership interest. Pet. App. 38a. Richard Abraham initially received a 30% limited partnership interest in his FLP, in exchange for relinquishing his claims against decedent’s estate. *Ibid.* Several times over the next few years, Ms. Cawley and Ms. Slater submitted checks to decedent or to the FLPs, and received additional limited partnership interests.

*Id.* at 39a-40a. Decedent also made gifts of partnership interests to Ms. Cawley, Ms. Slater, Mr. Richard Abraham, and their families. *Id.* at 40a-41a.

The stipulated estate plan was designed so that whatever transfers of assets might be undertaken, decedent was always to be adequately provided for, and her standard of living was to be maintained throughout her life. Pet. App. 24a-25a. Regardless how large a share each limited partner owned, all income from each FLP would be used first for decedent's support. The three partnerships were to "share equally" in decedent's support, and were to ensure that she had "sufficient funds for her adequate health, safety, welfare and comfort, as determined by the limited Guardian *ad litem*," David Goldman. *Id.* at 49a. Income would be distributed to the other limited partners (*i.e.*, decedent's children) only to the extent that it was not needed for decedent's support. *Ibid.* The stipulated estate plan also provided that the three children would share "pro rata" all gift and estate tax liabilities of the decedent. *Id.* at 35a.

2. Decedent died on June 9, 1997. Pet. App. 41a. A real estate appraiser determined the value of the FLPs as of the date of decedent's death for federal estate tax purposes, and then valued decedent's interest in the FLPs. *Ibid.* In calculating a market value for decedent's interest in each FLP, the appraiser applied a 30% to 40% discount for lack of marketability and minority interest. *Ibid.*

The estate filed an estate tax return, reporting on Schedule F (Other Miscellaneous Property Not Reportable Under Any Other Schedule) decedent's interest in each FLP. Pet. App. 42a. In valuing decedent's partnership interests, the estate relied on marketability and minority interest discounts.

After an audit, the Commissioner determined a \$1,125,210 deficiency (plus interest) in the estate tax reported. Pet. App. 30a. The Commissioner found that, through her guardian, decedent had retained an interest in the assets transferred to the partnerships within the meaning of 26 U.S.C. 2036(a), which recaptures property that a decedent has transferred during life while retaining the possession, enjoyment, or right to the income of the property. Moreover, the Commissioner concluded that the transfers were not bona fide sales for adequate and full consideration. Pet. App. 14a.

3. Petitioner challenged the deficiency in the Tax Court, which ruled in favor of the Commissioner. First, the court rejected the estate's argument that the burden of proof should shift to the Commissioner. Pet. App. 42a-45a. Proceeding to the merits of the case, the court held that the full value of the property transferred to the FLPs had to be included in decedent's gross estate. *Id.* at 45a-57a. The court noted that the general purpose of Section 2036 is to include in a decedent's gross estate "transfers that are essentially testamentary" because they "leave the transferor a significant interest in or control over the property transferred during his lifetime." *Id.* at 47a (quoting *United States v. Estate of Grace*, 395 U.S. 316, 320 (1969)). Possession or enjoyment of the property is retained, the court held, "where there is an express or implied understanding among the parties at the time of the transfer, even if the retained interest is not legally enforceable." *Id.* at 48a.

The court found that there was an express agreement giving the decedent the right to support and maintenance from all the income that the FLPs might generate. The decree authorizing the creation of the partnerships provided that "decedent's needs for support were

contemplated first from the income” of the partnerships, and only after those support needs were met “did the children/limited partners receive their proportionate share of the partnership income.” *Id.* at 48a-49a. The court also relied on the testimony of decedent’s daughter that the arrangement guaranteed that decedent would be maintained in the “status quo” and “constantly protected,” and that, even if decedent’s expenses “absorbed all of the income from the partnerships,” those expenses would have been paid. *Id.* at 50a-52a.

Thus, the court concluded that “[t]he documentary evidence, including the stipulated decree of the probate court, and the understanding of decedent’s children and legal representatives demonstrate that decedent was entitled to any and all funds generated from the partnerships for her support first,” and that “[o]nly after this could any excess be distributed in proportion of the partners supposed ownership interests.” Pet. App. 53a-54a. The court found these facts sufficient to establish that “decedent explicitly retained the right to the income that the FLPs generated to the extent necessary to meet her needs.” *Id.* at 54a.

The Tax Court rejected the estate’s argument that the decedent’s subsequent transfers of a percentage of her FLP interests qualified for an exception under Section 2036(a), which provides that property transferred in a “bona fide sale for an adequate and full consideration in money or money’s worth” is not included in the gross estate. Pet. App. 54a-55a. A few of those transfers were made as gifts, and the court held that the exception clearly did not apply to those. *Id.* at 55a. The court further found that the exception did not apply to the interests transferred in return for payments made by decedent’s daughters, Ms. Cawley and Ms. Slater, to

their respective partnerships, because sums paid to the partnerships, rather than to decedent, could not be treated as consideration. *Id.* at 56a. As to the other payments made to decedent in return for partnership interests, the court found that the estate had not adduced adequate evidence that the payments were full and adequate consideration for the interests transferred. The estate's only evidence of consideration consisted of letters from the attorney who set up the partnerships, which specifically purported to make "no representation \* \* \* that these discounts will hold up," *id.* at 55a, and which were determined to be inadmissible hearsay, *id.* at 21a & n.14. The court therefore found that "there is no evidence that the discounts taken under these facts were appropriate," and "no evidence as to the fair market value of the FLP interests on the date that the daughters purchased them." *Id.* at 55a.

4. The court of appeals affirmed. Pet. App. 1a-28a. The court held that the estate had not established any bona fide sales for adequate and full consideration, because it had "produced no admissible evidence concerning the adequacy of the discounted value of the FLP percentage interests." *Id.* at 21a. The court also rejected the estate's argument that the consideration paid was greater than the value of the remainder interests in the partnerships, because "no evidence in the record suggests that the parties ever contemplated the transfers as sales by Mrs. Abraham of remainder interests." *Id.* at 22a.

The court of appeals further affirmed the Tax Court's finding that decedent had retained the right to the income generated by the partnerships. The court found no clear error in the Tax Court's determination, based on both documentary evidence and testimony,

that decedent was entitled to any and all of the funds generated from the partnerships for her support first. Pet. App. 24a-25a.

#### ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioner argues (Pet. 10-18) that the decision below conflicts with this Court's decision in *United States v. Byrum*, 408 U.S. 125 (1972), and with the Fifth Circuit's decision in *Strangi v. Commissioner*, 417 F.3d 468 (2005). Petitioner is mistaken.

In *Byrum*, the decedent transferred stock in three closely held corporations that he controlled to an irrevocable trust for the benefit of his children, retaining for himself the right to vote the stock. 408 U.S. at 126-127. This Court concluded that the decedent did not retain sufficient control to warrant inclusion of the trust property in his gross estate under Section 2036(a)(2), which requires inclusion when the decedent retained the right "to designate the persons who shall possess or enjoy the property or the income therefrom." This Court based its conclusion on several impediments to the exercise of control, including the existence of "a substantial number of minority stockholders in these corporations who were unrelated to Byrum," such that Byrum was "inhibited by a fiduciary duty from abusing his position as majority shareholder for personal or family advantage to the detriment of the corporation or other stockholders." *Id.* at 142.

Petitioner argues that "the terms of the Court Order" placed an analogous constraint in this case by limit-

ing decedent's right to receive income from the partnerships. Pet. 12-13. Specifically, petitioner argues that David Goldman, "as guardian ad litem" and "as sole corporate officer of the FLPs' corporate general partners" had "fiduciary duties [to] all the limited partners," Pet. 13, and that "[t]hese limitations prevented [decedent] from having a right to income within the meaning of Section 2036(a)," Pet. 15.

Petitioner's argument misapprehends the significance of Goldman's position. Goldman was a fiduciary, but his fiduciary duties were to decedent. As he testified, his first responsibility was to see that decedent was properly maintained. Pet. App. 53a. Thus, he did not protect the interests of other holders of partnership interests; his job was to make sure that decedent was properly supported, regardless of the adverse consequences this might have for the other partners. Had he deemed it necessary to use all the income from the partnerships for decedent, it would have been his duty to do so. *Ibid.*

Finally, petitioner claims (Pet. 16) that the decision below conflicts with *Strangi* because that case purportedly required "actual possession or enjoyment of the property transferred," whereas here, the First Circuit held that "it is not necessary that the decedent-transferor retain a *legally enforceable interest* in the property" in order for Section 2036 to apply. Pet. App. 23a. Contrary to petitioner's contention, the court of appeals in *Strangi* expressly disavowed reliance on the decedent's actual possession of the property, stating that "[t]he controlling question is *not* whether [the decedent] actually kept any particular asset in his possession, but whether he *received a general assurance* that his assets would be available to meet his personal needs." 417

F.3d at 476 n.4 (emphasis added). *Strangi* cited the decedent's actual possession of the property only as one piece of "circumstantial evidence" of an implicit agreement between the decedent and his children. *Id.* at 477. Thus, *Strangi* comports with the court of appeals' holding that, even in the absence of actual possession or a legally enforceable agreement, an express or implied agreement may be sufficient to establish that a decedent retained a right to possession or enjoyment of the transferred property.

Petitioner's argument therefore comes down to a disagreement with the factual findings below. The Tax Court found an express agreement giving decedent the right to continue to receive the income generated by the property transferred to the partnerships, Pet. App. 48a, 53a, and that finding was affirmed by the court of appeals as not clearly erroneous, *id.* at 24a-26a. That conclusion is in no way inconsistent with *Strangi*, which found, on the facts of that case, a retention of interest based on an implied agreement. 417 F.3d at 476-477.

2. The court of appeals also affirmed the Tax Court's finding that the estate did not meet its burden of proving that the decedent transferred partnership interests to her two daughters in exchange for full and adequate consideration.<sup>1</sup> Pet. App. 21a. Petitioner contends (Pet. 16-17) that the court below interpreted the bona fide sale for "full and adequate consideration" exception to Section 2036(a) in a manner that creates a direct conflict with three earlier decisions, *Estate of*

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<sup>1</sup> Petitioner does not contend that there was adequate consideration for the decedent's initial transfer of assets to the three FLPs, but rather, relies only on the alleged adequacy of the consideration subsequently paid by decedent's daughters in return for FLP percentage interests.

*D'Ambrosio v. Commissioner*, 101 F.3d 309 (3d Cir. 1996), cert. denied, 520 U.S. 1230 (1997), *Wheeler v. United States*, 116 F.3d 749 (5th Cir. 1997), and *Estate of Magnin v. Commissioner*, 184 F.3d 1074 (9th Cir. 1999). According to petitioner, each of those cases held that “full [and] adequate consideration is measured against the present value of the remainder interest of the property transferred,” Pet. 17.

Those cases are inapposite. In each of them, the decedent had *sold a remainder interest* in property for its actuarial value, while retaining a life estate. *D'Ambrosio*, 101 F.3d at 311; *Wheeler*, 116 F.3d at 751-752; *Magnin*, 184 F.3d at 1076. Accordingly, the courts held “that ‘adequate and full consideration’ for Section 2036 purposes should be measured by what the decedent actually sold—the remainder interests—and not the fee value of the property as a whole.” Pet. App. 22a. In contrast, the transfers here were *not* sales of remainder interests. See *id.* 22a-23a (“[N]o evidence in the record suggests that the parties ever contemplated the transfers as sales by [decedent] of remainder interests in the FLPs.”). Accordingly, no conflict exists.

Indeed, far from creating a conflict, the decision below is in accord with those cases and with other recent appellate decisions, all of which interpret the bona fide sale exception as requiring any “reduction in the estate’s value” to be “joined with a transfer that augments the estate by a commensurate \* \* \* amount.” *Strangi*, 417 F.3d at 478-482 (quoting *Kimbell v. United States*, 371 F.3d 257, 262 (5th Cir. 2004)); see *Estate of Thompson v. Commissioner*, 382 F.3d 367, 378-383 (3d Cir. 2004); *Magnin*, 184 F.3d at 1077-1078; *Wheeler*, 116 F.3d at 762; *D'Ambrosio*, 101 F.3d at 312-313; accord *Estate of Bongard v. Commissioner*, 124 T.C. 95, 114-129 (2005).

In this case, the court of appeals properly considered whether the amount paid by decedent's daughters was equal to the value of the transferred FLP interest. The court rejected, however, petitioner's assertion that discounts for minority interest and lack of marketability should have been applied in computing the value of the FLP interests, because the estate produced "no admissible evidence concerning the adequacy of the discounted value percentage interests." Pet. App. 21a. That factual determination does not warrant further review by this Court.

3. Finally, petitioner argues (Pet. 17-18) that the government failed to "properly identify the taxable event" and "never properly challenged the [Estate's] valuation [of the FLP interests owned by the decedent at her death] by raising Section 2033."<sup>2</sup> As the court of appeals found, however, "Section 2033 was never an issue at trial nor was it mentioned in the Notice of Deficiency because the Estate never disputed that the FLP interests explicitly held by [decedent] at her death were includable in her gross estate." Pet. App. 27a. Moreover, the government did not dispute "the valuation" of the partnership interests owned by decedent at her death. Indeed, the government based its valuation of the partnership interests on the Estate's own appraisal. *Id.* at 19a. The sole legal basis for the deficiency determination was Section 2036, which the notice of deficiency specifically cited. *Id.* at 44a. Petitioner's objection is therefore without merit.

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<sup>2</sup> Section 2033 provides that "[t]he value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death." 26 U.S.C. 2033.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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